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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether a national not-for-profit professional society should be held strictly accountable in treble damage liability under Sections 1 and 2 of the Sherman Act based upon conduct of volunteer members acting within their apparent authority, which conduct was not authorized or ratified by the society or carried out for its benefit.

2. Whether a national not-for-profit professional society's unintentional participation in a conspiracy to restrain and monopolize trade is a sufficient predicate for the imposition of treble damage liability on the society under Sections 1 and 2 of the Sherman Act.

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BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The Institute of Electrical and Electronics Engineers, Inc. ("IEEE" or "Institute") submits this brief *amicus curiae*, with the consent of all parties, in support of the petition for a writ of certiorari filed by The American Society of Mechanical Engineers, Inc. ("ASME" or "Petitioner"), to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 24, 1980.

The decision of the Second Circuit raises serious and substantial policy, practical and operational implications for IEEE. IEEE is the world's largest engineering society with over 200,000 individual members engaged in a broad range of technical and professional activities, including the development and issuance of voluntary standards, which

are aimed at the advancement of the theory and practice of electrical and electronics engineering and the allied arts and sciences. The Court of Appeals held a sister society, the ASME, liable to respond in treble damages under the Sherman Act based on misconduct of two of ASME's 90,000 volunteer members while acting within their so-called apparent authority, without regard to whether such conduct was carried out for the ASME's benefit or ratified by it. The novel and unsound rule enunciated in the Court of Appeals' opinion effectively subjects professional societies to a species of strict liability in antitrust cases and threatens curtailment of the useful voluntary standards, technical, publication and educational programs such societies undertake for their good and the public interest.

Opinion Below

The opinion of the Second Circuit Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980), and is reprinted in the Appendix to ASME's petition for a writ of certiorari at A-1 to A-26.

Statutes Involved

The statutes involved in this case are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970). These statutes are set forth in full in the Appendix at the end of this brief.

Summary of Argument

The Second Circuit, in a clear departure from precedent, has fashioned a new rule and policy that professional societies may be held liable to respond in treble damages under the Sherman Act for the acts of their volunteer members within their apparent authority even if the agents acted to benefit only themselves, not the society principal's interests. Established authority in this Court and elsewhere, in contradistinction, permits corporate Sherman Act liability for the acts of an agent only when the agent acts in the ordinary course of business to advance the principal's interests or when the principal ratifies the agent's conduct. The Court of Appeals' unreasoned and overreaching interpretation of the Sherman Act not only places professional societies at risk of strict antitrust liability based on a showing of mere unintentional participation in asserted unlawful conduct, but also strikes at the foundation of such societies' system of voluntary participation in useful technical, publication and educational programs. The new rule thus seriously threatens to curtail many of these beneficial activities.

For decades, the IEEE and other professional societies have, through dedicated volunteer efforts, issued and interpreted industrial and engineering standards, published and disseminated technical information, and fostered continuing technical and professional education in the public interest. They have done so through volunteer efforts structured in such a way as to recognize professional creativity, ingenuity and diversity, while, at the same time, providing a framework of procedural controls for institutional review to foster effective management and to aid in compliance with law, including the antitrust laws. This system of voluntary participation guided by flexible controls reflective of the diverse character of professional

societies and their members has resulted in valuable technical advancement, greater industrial competence and achievements and greater societal understanding of the use and value of engineering knowledge and technology.

The Second Circuit's unfounded rule of strict accountability under the Sherman Act is in conflict both with the philosophy of voluntary participation in professional society programs and with the realities of practical functioning of such societies. Its imposition may needlessly and seriously undercut the willingness of societies and their members to devote time to professional society activities and to continue to explore new areas of technical and professional endeavor, because the attendant antitrust risks of participation will be heightened greatly and because these risks cannot be sufficiently minimized by imposing more review and controls without stifling the system of voluntary participation. Indeed, a rule of strict liability may herald the curtailment of beneficial professional society programs in any case where organizational procedures theoretically may be abused by volunteer members for individual commercial advantage. In a large society such as IEEE, a significant number of such programs may be jeopardized, in spite of the existence of reasonable, workable procedural controls because of the impossibility of policing all society members' conduct. Accordingly, the Second Circuit's ill-conceived, overbroad rule of strict antitrust liability for professional societies, which demonstrably has neither legal nor practical foundations, should be reversed.

REASONS FOR GRANTING THE WRIT

The Second Circuit's Unreasoned and Overreaching Decision Imposing Strict Antitrust Liability on the ASME Should Be Reversed For It May Seriously Impair Beneficial Voluntary Technical, Publication and Educational Activities of Professional Societies Against Their and the Public Interest.

A. *The Court of Appeals Adopted an Erroneous Rule of Agency Liability for Professional Societies Under the Sherman Act.*

The overbroad rule adopted by the Second Circuit panel in *Hydrolevel Corp.* v. *American Soc. of Mech. Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980), is one of great significance for American professional societies in general and the IEEE in particular. The case as presented at trial involved the charge that representatives of the largest maker of a water boiler safety device known as a low-water fuel cut-off, McDonnel & Miller, Inc., and the leading underwriter of boiler insurance, Hartford Steam Boiler Inspection and Insurance Company ("Hartford"), and ASME, conspired in violation of Sections 1 and 2 of the Sherman Act to lessen competition by unlawfully restraining the sale of a competing type of fuel cut-off. The conspiracy theory advanced by plaintiff at trial rested on asserted misuse of the ASME committee structure charged with interpretation of that society's Boiler and Pressure Vessel Code ("Code"), which set performance standards for components of steam and water boilers and pressure vessels. 635 F.2d at 121. This misuse consisted of submitting a "loaded" question to the ASME, which elicited a misleading response

concerning the compatibility of Hydrolevel Corporation's fuel cut-off with applicable ASME Code requirements.*

With respect to the liability of ASME for conspiracy,** the District Court charged the jury that in order to find ASME responsible for the acts of its representatives, they had to find that ASME ratified the acts of its agents or that the agents acted to advance ASME's interests. 635 F.2d at 124-25. The lower court rejected plaintiff's proposed charge to the effect that "ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME." On the instruction given, the jury returned a verdict for Hydrolevel. 635 F.2d at 124.

On appeal, the parties' arguments focused on whether the evidence would support a verdict for Hydrolevel under either of the theories presented to the jury through the district judge's instructions. In its opinion, however, the Court of Appeals departed from established authority in

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* The "loaded" question was included in a letter of April 12, 1971, which inquired whether a fuel cut-off with a time delay device, such as Hydrolevel's, was compatible with Paragraph HG-605 of ASME's Code. The response of April 29, 1971, sent through an ASME staff secretary, but, in reality, composed by the Hartford representative, indicated that it was the intent of Paragraph HG-605(a) that "the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gauge glass," and that with a time-delay feature functioning after the water level went below the glass gauge, there would be "no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." 635 F.2d at 121-22. Armed with this response to the April 12 inquiry letter, McDonnel & Miller, Inc. proceeded to take advantage of it to dissuade customers not to purchase the Hydrolevel fuel cut-off, until Hydrolevel learned of the response of April 29, 1971, and was later advised that ASME, by letter of June 9, 1972, effectively disavowed any misleading character of the April 29, 1971 letter.

** The other two defendants, McDonnel & Miller, Inc. and Hartford, settled with plaintiff before trial. 635 F.2d at 124.

this Court and the lower courts which holds that a corporate principal may be liable under the Sherman Act for the acts of its agent only when the agent's conduct in the course of his actual authority in his employment duties was undertaken to advance the principal's interests. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Standard Oil Co.* v. *United States*, 307 F.2d 120, 129 (5th Cir. 1962); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 830 (D. Md. 1937). *See Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304 (1925). Instead, it relied on the thesis that a novel extension of this established rule of agency liability would "induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance. . . ." 635 F.2d at 125. The Circuit Court thus concluded that to uphold ASME's liability under the Sherman Act exposing it to punitive treble damages,

> "Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions." 635 F.2d at 127.

Thus, without regard to the absence of any evidence that ASME's disloyal volunteers acted to benefit ASME in the conspiracy to restrain and monopolize trade under the Sherman Act and with only what it termed "ASME's unintentional participation" in the "harm Hydrolevel suffered" (635 F.2d at 131), the Court of Appeals sustained ASME's liability. In effect, the Second Circuit has embraced a special rule of strict liability for treble damages

for "unintentional participation" by professional societies in conduct which violates the Sherman Act. Professional societies are relegated to operate in an atmosphere subject to the constraint that if they should place a volunteer member in a position to misuse the society's organizational procedures or commit wrongs actionable under the antitrust laws, they must simply "bear the consequences." 635 F.2d at 126.

In adopting this approach, moreover, the Second Circuit's opinion, in fact, did not reach the two specific issues embodying theories of liability reflected in jury instructions in the lower court and actually argued by the parties. The first was whether there was any evidence that ASME intentionally or deliberately participated in a conspiracy to restrain and monopolize trade; the second was whether ASME's conduct in response to disclosure of the misleading use of the letter issued through the ASME amounted to ratification by it of the acts upon which the conspiracy was based.

B. *The IEEE Has Engaged in Useful Technical, Publication and Educational Programs for Its Members and for Public Benefit.*

The Second Circuit's new, unsound policy of strict accountability for professional societies under the Sherman Act promises to subject societies' beneficial technical, publication and educational activities to a host of needless and harmful consequences, and its deleterious impact will be experienced directly by IEEE. The Institute, which dates to 1884 with the establishment of the American Institute of Electrical Engineers, is currently the world's largest engineering society. Its objectives are both technical and professional in nature and are intended to promote the theory and practice of electrical and electronics engineering, the allied arts and sciences and engineering disciplines.

The IEEE is also committed to enhancing the quality of life for all people, through the application of technology in its field of competence and to promoting the understanding of the influence of that technology in the public welfare. As a transnational organization, IEEE serves more than 200,000 members organized geographically into 10 worldwide regions and various local sections and student branches. Also, primarily through libraries, the IEEE serves some 10,000 nonmember subscribers with its wide variety of publication services.

Among the many technical activities carried out by IEEE is the drafting and promulgation of voluntary standards,* an activity which figured centrally in the antitrust violation upheld by the Court of Appeals. IEEE has well over

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* IEEE standards are documents which set forth:

"(1) Lists of terms, definitions, or symbols, applicable to any field of science or technology within the scope of IEEE; (2) Expositions of scientific methods of measurement or tests of the parameters or performance of any device, apparatus, system or phenomenon associated with the art, science, or technology of any field within the scope of IEEE; (3) Characteristics, performance, and safety requirements associated with devices, equipments, and systems, with engineering installations; or (4) Recommendations reflecting current state-of-the-art in the application of engineering principles to any field of technology within the scope of IEEE." IEEE Standards Manual 1.2 (March 1978).

IEEE standards are "voluntary." The use of that term in this connection means that the choice of standards to be developed is voluntary, that the implementation of the standards developed is voluntary, that the organizations that develop standards are primarily organized to perform other functions and voluntarily develop standards because they have the unique expertise to do so, and that the individuals who work on the development of standards volunteer their time and effort as a public service. Further, even the application of these standards is voluntary, so that standards are used because their users have decided that they have merit and meet their requirements. This voluntary system has been responsible for effective utilization of technology at low cost to the public, and has in many ways been responsible for the technological leadership of the United States since the turn of this century.

a hundred technical committees involved in standards development, comprising 20,000 members covering some 850 standards projects and over 400 published standards. IEEE also provides formal representatives to other standardizing bodies. These standards are used by the industrial world for technical communications, for reproducibility of scientific measurement, for public safety, and for regulation. They provide a common ground for communication among those using the standards and help to make possible the safe wiring of public buildings, the safe transmission and distribution of electric power, the licensing of nuclear power stations by the Nuclear Regulatory Commission, the maintenance of safe industrial work places through federal agency regulations, the communication among people through telephone and radio systems, and the economic health and well-being of the peoples of the world through promotion of common international practices. Most important, these benefits are achieved essentially through the contributions of dedicated volunteer engineers and scientists working within the organizational structure of IEEE technical societies.

Furthermore, standards development and interpretation within IEEE are governed by procedures designed to achieve fairness by ensuring, for example, a balance of interests on standards committees, as well as the achievement of overall consensus by requiring, among other things, a high level of voting approval before issuance of a standard. The IEEE likewise works to secure adherence to the essentials of due process in handling complaints about standards through various appeals within the IEEE organization.* However, given the number of volunteer participants and the diversity of subject matter covered by

* The ASME follows substantially similar procedures in developing its own standards.

its standards, the Institute, within the framework of a flexible, voluntary system, realistically cannot oversee the activities of each standards or technical committee in detail.

Standards-making is only one of IEEE's technical activities, and other technical activities of the Institute share similar characteristics. The broad range of technical activities includes acoustics, ocean engineering, vehicular technology, nuclear science, information theory, management and social implications of technology. Each year, through its technical and regional entities, the IEEE sponsors or co-sponsors 150 major conferences and conventions. Most of these conference meetings publish proceedings and the conference books contain as many as 13,000 papers annually.

Control over technical activities, reflecting the diversified and voluntary nature of IEEE, is exercised, according to the Institute's Constitution and Bylaws, through governing groups of IEEE's thirty-one technical societies and allied technical councils. The societies and councils in turn have an infrastructure of hundreds of committees on which thousands of members serve. Most of these committees have their own stationery with the IEEE logo and identification and are capable of acting with a fair degree of autonomy and independence. Moreover, while the technical papers and conference publications at the core of IEEE technical activities are subject to review by peer-reviewers, many deal with controversial issues which may have considerable commercial significance, and not all can be reviewed in minute detail before presentation or publication.

Complementary to the IEEE's voluntary standards and technical activities are its publishing and educational programs. The IEEE perceives as one of its most impor-

tant services to the engineering and scientific communities the dissemination of evaluated technical information to advance knowledge and the state of the art. In its role as publisher, the IEEE publishes some 16,000 technical papers each year accounting for almost fifteen percent of the total world literature in electrical and electronics engineering, which because of their high quality, have achieved supranational recognition. The feasibility and quality of the publication enterprise depend on the volunteer efforts of some 15,000 members who act as reviewers and another 500 who serve as editors and conference organizers. In this area as in others, the Institute has imposed reasonable general organizational and operating controls by virtue of peer review and reviewer selection, but it is not in a position to second-guess the motives or the commercial intentions of all reviewers, some of whom might be regarded as potential professional or commercial competitors of a particular author.

In similar fashion, the Institute's educational programs work through volunteer support and further the important engineering and societal goals of maintaining a high level of engineering technology and education both in collegiate engineering programs and in post-graduate continuing education. In the field of continuing education, the Institute offers over 170 different short courses on a wide range of engineering topics through the efforts of 600 to 1000 volunteers. At the undergraduate level, the Institute acts to further engineering knowledge through participation in formulation of collegiate curricula. Also, in conjunction with the Accreditation Board for Engineering and Technology, the Institute participates in volunteer accreditation of engineering programs as representing a satisfactory level of engineering education for over 390 separate engineering programs at over 100 colleges and

universities. Here again, the Institute relies on general peer review to ensure reasonable control over the activities of volunteer members and to reduce the risk that specific members' personal or commercial interests might be used for individual advantage to the detriment of competing interests.

C. *The Second Circuit's Unwise Rule of Strict Antitrust Liability May Seriously Impede Continuation of the Beneficial Programs of IEEE and Other Professional Societies.*

Retention of the expansive rule of strict liability endorsed by the Court of Appeals threatens materially and adversely to affect the useful standards, technical, publication and educational activities of the Institute and other similar societies—by undermining the voluntary participation of society members and by exposing members and society organizations to much greater and unwarranted antitrust risks through the imposition of strict antitrust liability. Such a result runs counter to the recognition that professional societies perform valuable functions for their members and society as a whole. This Court acknowledged over a half-century ago that trade and professional societies have undertaken a wide range of programs "which are admittedly beneficial to the industry and to consumers. . . ." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 566 (1925). Without the consistent support and devotion of time of its volunteer members, IEEE's standards, technical, publication and educational programs could not continue in their present form. Nor would such beneficial programs be absorbed by government for its resources are likewise limited. Thus, the unwise policy of the Court of Appeals' new rule is not in the public interest, and it is likely to prove unworkable as a practical matter.

In the standards-making area, budgetary and organizational constraints simply will not permit the kind of perva-

sive supervision of IEEE's pre-existing consensus system, designed to balance interests and establish fair standards, that the Court of Appeals' rule seems to require in order to minimize the risk of antitrust liability. As a result, the Institute's contributions in this area might be seriously diminished. Moreover, the *in terrorem* effect of the Second Circuit's rule may well bear on the willingness of members or their employers to participate in IEEE standards programs.

Further, the impact of the new rule of strict accountability with its undermining of the voluntary participatory system that characterizes the IEEE and other professional societies will also spill over into the technical, publication and educational activities of the Institute with the same harmful consequences. In each of these areas, the Institute has hundreds, in some cases thousands, of volunteer members working to advance the interests both of the engineering profession and of society as a whole by expanding the knowledge and quality of engineering services and technology. IEEE has taken reasonable steps to reduce or eliminate risks that its procedures might be misused to allow a particular, selfish competitive interest to win out at others' expense, but notwithstanding these efforts, the Court of Appeals' rule superimposes the impractical and unfair requirement that IEEE and other societies are to be subject to the heightened risk of strict liability for less than intentional wrongdoing. This Court should not allow such an overbroad rule, lacking in both legal and practical foundations, to stand.

CONCLUSION

For the foregoing reasons, the petition of The American Society of Mechanical Engineers, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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APPENDIX

Statutes Involved

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. *Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.